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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1067

SEABOARD AIR LINE RAILROAD COMPANY,
Petitioner,

vs.

WARREN G. WILLIAMS, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WARREN G. WILLIAMS, JR.,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

PREFACE

The Petitioner, Seaboard Air Line Railroad Company, presently known as Seaboard Coastline Railroad Company, was the Defendant in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

The Respondent, Warren G. Williams, Jr., was the Plaintiff in the Florida Trial Court.

In this brief, the parties will be referred to as they presently stand before this Court or as "Seaboard" and "Williams" respectively.

The following symbols will be used:

"R" Record on Appeal.
"SR" Supplemental Record on Appeal.
"PET" Petitioner's Appendix.

II

STATEMENT OF THE CASE

The Respondent accepts in part and rejects in part the Statement of the Case set forth at pages 4 through 6 of the Petition. It is true, of course, that this is a standard negligence action governed by principles of Florida law. The case was originally tried under Florida Statute Section 768.06, F.S.A. 1959, which provided that the doctrine of "comparative negligence" should govern negligence actions against railroad companies. Throughout the period of time that the case proceeded toward trial, the Petitioner never raised the issue of the statute's constitutionality. After jury verdict and final judgment in favor of the Respondent, the Petitioner appealed to the District Court of Appeal of Florida, Second District (and it was subsequently transferred to the newly formed Fourth District). The Petitioner did not raise any point on appeal in reference to F.S. Section 768.06 or the charge to the jury referenced to the doctrine of "comparative negligence". While the appeal was pending before the District Court, the Florida Supreme Court held F.S. Section 768.06 unconstitutional in *Georgia Southern and Florida Railway Co.* v. *Seven-Up Bottling Co. of Southeast Georgia, Inc.*, 175 So.2d 39 (Fla. 1965). It was only after this decision was raised that the Petitioner raised, for the first time on appeal, an issue as to the constitutionality of the statute. The Petitioner filed two motions before the District Court. The first motion sought an immediate remand to the Trial Court for a new trial under the doctrine of contributory negligence. (SRDist.Ct.-1-10) The second and alternative motion sought leave to amend the assignments of error and to file a supplemental brief based upon the *Seven-Up* decision. (SRDist.Ct.-11, 12) The *Seven-Up* decision provided for no retroactive application.

The District Court therefore refused to apply that decision retroactively and affirmed the Trial Court's final judgment per curiam. (PET-20a)

On Petition for Certiorari to the Florida Supreme Court, the *Seven-Up* decision was given retroactive application to the instant case despite the tardy manner in which the constitutional question was raised. The District Court's opinion was reversed and the case remanded for new trial based upon the principles of contributory negligence. *Seaboard Air Line Railroad Co.* v. *Williams*, 199 So.2d 469 (Fla. 1967). The Respondent then petitioned this Honorable Court for review and asserted that the retroactive application given to the *Seven-Up* decision had deprived him of a vested right in violation of the due process and equal protection guarantees of the United States Constitution. The petition was denied, 390 U.S. 920 (1968).

A retrial based upon "contributory negligence" resulted in a final judgment for the Defendant-Petitioner. A second appeal to the District Court of Appeal, Fourth District, was taken—this time by the Respondent. Again a per curiam affirmance was rendered and the Respondent filed a Petition for Certiorari to the Florida Supreme Court. While the petition was pending, *Hoffman* v. *Jones*, 280 So.2d 431 (Fla. 1973) was decided. That decision replaced the outmoded and unjust doctrine of "contributory negligence" with the modern doctrine of "comparative negligence". Although the Petitioner asserts that the *Hoffman* v. *Jones* decision was relied upon by the Florida Supreme Court to give renewed effect to F.S. Section 768.06 which was previously held unconstitutional, such is not the case. *Hoffman* v. *Jones* held that "comparative negligence" is the doctrine to be applied to *all negligence actions*—not simply in actions against railroad companies. Because of the importance of the *Hoffman* decision, the Florida Su-

preme Court specifically set forth the circumstances under which the "comparative negligence" doctrine should apply. At page 440, the Florida Supreme Court stated:

> "III. As to those cases in which trial has already begun or in which verdict or judgment has already been rendered, this opinion shall not be applicable, *unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage in the litigation.*"

Based upon the precedent established in *Hoffman* v. *Jones* and because the Respondent had continuously asserted the applicability of the "comparative negligence" doctrine and the inapplicability of the "contributory negligence" doctrine and because the case had already been tried once under the doctrine of "comparative negligence", the Florida Supreme Court granted certiorari and held that, "Both justice and common sense mandate that we simply reinstate the original judgment of the Trial Court in this matter." (PET-5a)

At page 6 of the Petition, it is asserted that, "The question of violation of federally guaranteed rights of Seaboard was raised immediately upon realization that the Supreme Court had done violence to them." Such is not the case. Immediately after the rendition of the *Jones* v. *Hoffman* decision, 272 So.2d 529 (Fla. 4 DCA 1973) in the intermediate Appellate Court of Florida, supplemental briefs were filed in the Florida Supreme Court arguing the applicability of the District Court decision to the case sub judice. The Petitioner raised no federal constitutional questions at that time. Even after the Florida Supreme Court rendered its decision in the instant case, no federal constitutional question was presented to the Florida Supreme Court by the Petitioner. Although it filed a petition for rehearing (PET-41a-43a) and supple-

ment to petition for rehearing (PET-43a-44a), the only point at which the constitution was even mentioned was in Paragraph 4 of the petition for rehearing wherein the general conclusionary statement was made that "by permitting the Petitioner to re-litigate issues already finally determined by this Court in accordance with Florida Rules of Civil Procedure, the Court does violence to the due process clause of the Fourteenth Amendment of the United States Constitution and Section 9 of Article 1 of the Constitution of the State of Florida." (PET-42a) Such a brief conclusionary statement raised for the first time on petition for rehearing hardly preserves a constitutional question in the State Court below. Under such circumstances, the Petitioner should not be allowed to raise a constitutional issue for the first time in this Court and the Petition should be denied.

In order to assist the Court in establishing at what point various issues were raised in the Florida Appellate Courts, the Respondent has requested a supplemental record to be certified to this Honorable Court.

III

QUESTIONS PRESENTED

The Respondent takes issue with the questions presented in the Petition and respectfully submits that the questions presented are not dispositive of the true issues raised by the Petition. The Respondent respectfully submits that the questions presented are as follows:

I

ASSUMING THAT THE CASE ACTUALLY RAISES A SUBSTANTIAL FEDERAL QUESTION, HAS THAT QUESTION BEEN PROPERLY RAISED AT THE STATE COURT LEVEL?

II

SHOULD CERTIORARI BE GRANTED WHERE IT APPEARS THAT THE DECISION OF THE SUPREME COURT OF FLORIDA WAS BASED UPON ADEQUATE NON-FEDERAL GROUNDS?

III

DO THE FACTS IN THIS CASE PRESENT QUESTIONS OF SUFFICIENT PUBLIC IMPORTANCE TO INVOKE THE DISCRETIONARY POWER OF THIS COURT TO GRANT CERTIORARI?

IV

Point I of Petitioner

WHETHER IT IS A VIOLATION OF SEABOARD'S RIGHT OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES FOR THE SUPREME COURT TO REINSTATE A JUDGMENT THAT IT HAD PREVIOUSLY REVERSED BECAUSE IT WAS BASED ON A STATE STATUTE THAT IT HAD DECLARED TO BE UNCONSTITUTIONAL?

Point II of Petitioner

WHETHER IT IS A VIOLATION OF SEABOARD'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION FOR THE SUPREME COURT OF FLORIDA TO GIVE RETROSPECTIVE APPLICATION TO A RECENT DECISION REVITALIZING A STATE STATUTE WHICH IT HAD PREVIOUSLY HELD TO BE INVALID AND

WHICH WAS NOT IN EFFECT AT THE TIME THE CASE WAS TRIED, APPEAL COMPLETED AND PETITION FOR CERTIORARI FILED?

combined and restated by the Respondent:

IN HOLDING *HOFFMAN V. JONES* TO BE APPLICABLE TO THE INSTANT CASE DID THE FLORIDA SUPREME COURT VIOLATE THE PETITIONER'S CONSTITUTIONAL RIGHTS?

IV

ARGUMENT

I

Assuming That the Case Actually Raises a Substantial Federal Question, Has That Question Been Properly Raised at the State Court Level?

At page 2 of the Petition it is asserted that 28 U.S.C. Section 1257(3) is relied upon to invoke the jurisdiction of this Court. Obviously, the Florida Supreme Court decision did not pass upon the validity of any treaty or state or federal statute. Therefore, jurisdiction, under the aforementioned United States Code provision, may only lie where a federal title, right, privilege, or immunity was "specifically set up or claimed" in the proper and correct manner. The proper manner to raise the federal question is dependent upon state practice but the law is well-established that it is essential to the vesting of jurisdiction in this Court that the federal question be raised at the state Court level. This, the Petitioner failed to do, and it is for this reason that the Respondent has filed several requests to supplement the record. The request to the Clerk of the Supreme Court of Florida places before this Court all of the briefs filed in the Florida Supreme Court. Although briefs are not normally regarded as part of the record below to be certified, a special circumstance exists in the instant case to bring these before this Court. See *Stearn and Gressman, Supreme Court Practice,* 4th Edition, page 271. With the briefs before this Court as part of the record, it is obvious that although the applicability of the *Hoffman* v. *Jones* decision to the case sub judice was briefed and argued below, the Petitioner, at no time, prior to the rendition of the Florida Supreme Court's opinion attempted to assert a federal question. (Indeed,

the applicability of *Hoffman* v. *Jones* to the instant case was briefed when *Hoffman* v. *Jones* was still pending before the Florida Supreme Court since the Fourth District Court of Appeal had originally adopted "comparative negligence" in the case of *Jones* v. *Hoffman*, supra, and certified the question to the Florida Supreme Court.) Despite the briefing in the Florida Supreme Court relative to *Hoffman* v. *Jones*' applicability to the instant case, the Petitioner never asserted that applying that decision to the instant case would deprive it of a federally guaranteed right. Even after an adverse decision by the Florida Supreme Court, the only reference by the Petitioner to any federal question is found in a brief conclusionary remark in Paragraph 4 of its petition for rehearing asserting that the decision "does violence to the due process clause of the Fourteenth Amendment of the United States Constitution. . . ." (PET-42a) No explanation or further briefing is given to this conclusionary statement.

Even if the Petitioner had properly raised and argued a federal question in its petition for rehearing, such is not the proper time to preserve its claim for review in this Court "(I)f you are about to commence litigation (in a State Court) in which there may be involved, then or ultimately, a question arising under the constitutional laws of the United States, you must raise the federal question at the outset and not as an afterthought after you have lost below. By that time you are almost always too late . . . unless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you don't have any chance at all." Wiener, *Wanna Make a Federal Case Out Of It?* 48 A.B.A.J. 59, 60, 62 (1962).

A party cannot consciously delay raising a federal question in the state proceedings. Doing so amounts to a waiver of the federal question. *Henry* v. *State of Missis-*

sippi, 379 U.S. 443 (1965), reh. den. 380 U.S. 926 (1965). Timely insistence upon the federal grounds relied upon for jurisdiction in this Court must be made at the state Court level. Where no federal constitutional question is raised below, the question cannot be raised for the first time in this Court. *Charleston Federal Savings and Loan Asso.* v. *Alderson*, 324 U.S. 182 (1945); *Raley* v. *State of Ohio*, 360 U.S. 423 (1959); *Slagle* v. *State of Ohio*, 366 U.S. 259 (1961).

In *Hanson* v. *Denckla*, 357 U.S. 235, 244 (1958), this Court held it was without jurisdiction to consider an appeal from the Florida Supreme Court since the federal ground relied upon for jurisdiction (the unconstitutionality of Florida's Constructive Service Statute) was not raised until petition for rehearing in the Florida Supreme Court. This was so held despite the fact that the defendant did assert a general conclusionary motion to dismiss in the Trial Court but failed to brief or further argue any federal question until petition for rehearing in the Florida Supreme Court.

In *Hill* v. *California*, 401 U.S. 797, 805 (1970) a criminal defendant attempted to raise for the first time before this Court the question of a deprivation of his Fifth Amendment rights by the introduction of pages of his diary in evidence against him. Since the question "had never been raised, preserved, or passed upon in the state court", this Court relied upon *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969) and "a long line of cases" and held it was without jurisdiction to reach the issue. See also *Monks* v. *New Jersey*, 398 U.S. 71 (1970).

The Petitioner asserts at page 6 of its Petition that: "The question of violation of federally guaranteed rights of Seaboard was raised immediately upon realization that the Supreme Court had done violence to them." Such is not the case as is established by the supplemental record be-

fore this Court. The Petitioner well knew the Respondent was arguing for the precedent of *Hoffman* v. *Jones* to be applied in the instant case and for the reinstatement of the original jury verdict if and when the Florida Supreme Court determined that "comparative negligence" was to be applied uniformly in all negligence litigation. Supplemental briefs were filed when *Hoffman* v. *Jones* was still pending before the Florida Supreme Court. Yet, the federal constitutional question asserted before this Court was never raised in the Supreme Court of Florida. In fact, the two points relied upon by the Petitioner in this Court are founded upon an equal protection argument, and, as previously mentioned, the only provision of the United States Constitution even briefly mentioned in the Supreme Court of Florida was the "due process clause" at Paragraph 4 of the petition for rehearing. (PET-42a)

Under such circumstances, this Court must find that it is without jurisdiction and deny the Petition for Certiorari.

II

Should Certiorari Be Granted Where It Appears That the Decision of the Supreme Court of Florida Was Based upon Adequate Non-Federal Grounds?

In an unbroken line of decisions, this Court has held that when a state Court, in entering the order attacked in this Court, does so on a non-federal ground, this Court has held it is without jurisdiction to review such order. *Newman* v. *Gates*, 204 U.S. 89 (1907); *John* v. *Paullin*, 231 U.S. 583 (1913); *Atlantic Coastline Railroad* v. *Mims*, 242 U.S. 532 (1916); *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 190 (1925); *McMaster* v. *Gould*, 276 U.S. 284 (1927); *Wolfe* v. *State of North Carolina*, 264 U.S. 177 (1960). This principle is axiomatic and is concisely summarized in *Henry* v. *Mississippi*, supra, wherein this Court stated:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, Murdock v. City of Memphis, 2 Wall 590, 22 Law Ed. 429, but also in cases involving state procedural grounds. . . Under the view taken in Murdock of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the adequate non-federal ground doctrine is necessary to avoid advisory opinions."

Furthermore, where, as in the instant case, the highest state Court failed to mention in its opinion or give any discussion to a federal question, this Court will assume that such omission was due to the fact that the question was not presented in the state Court. This presumption must stand unless the Petitioner can affirmatively show that the question was raised and properly briefed. *Bailey* v. *Anderson,* 326 U.S. 203 (1945); *I. and L. R. Co.* v. *McGuire,* 196 U.S. 128, 131-133 (1905); *Street* v. *New York,* 394 U.S. 576, 582 (1969).

The opinion of the Florida Supreme Court (PET-1a-6a) not only demonstrates that it is based upon the state law of "comparative negligence" and the precedent of *Hoffman* v. *Jones,* but, more importantly, demonstrates that no federal issue was ever placed before it for consideration. The decision to apply *Hoffman* v. *Jones* to the instant litigation is based upon the non-federal grounds that the case was previously tried under an identical "comparative negligence" doctrine and, therefore, a new trial (under the precedent of *Hoffman* v. *Jones*) would serve no useful purpose. The decision in *Hoffman* v. *Jones* to adopt

"comparative negligence" for Florida is purely state oriented and the applicability of *Hoffman* to the instant case is based on the non-federal grounds that the Respondent had "appropriately and properly raised" the doctrine of "comparative negligence" before the *Hoffman* opinion was rendered. The decision, both substantively and procedurally, is based upon non-federal grounds and is not subject to review by this Court.

III

Do the Facts in This Case Present Questions of Sufficient Public Importance to Invoke the Discretionary Power of This Court to Grant Certiorari?

Interestingly, the Respondent previously petitioned this Court for a writ of certiorari after the Florida Supreme Court retroactively applied its decision in *Georgia Southern and Florida Railway Co.* v. *Seven-Up Bottling Co. of Southeast Georgia, Inc.*, supra, and reversed and remanded this case for a new trial. In its brief in opposition, the Petitioner (at that time, Respondent) argued vehemently that the Florida Supreme Court's decision "affects only a small number of people in Florida who incur injuries by driving upon the railroad tracks when trains are coming, or who strike trains on the tracks." Respondent's brief in opposition, Case No. 855, October Term, 1967, page 12. The instant case involves an even more minute section of the nation's population—that portion of Florida citizenry who happened to have previously tried a case under Florida's now defunct railroad negligence statute (F.S. Section 768.06, F.S.A. 1959), who received a judgment which was voided by retroactive application of the *Seven-Up* decision, and who were still in the Appellate Courts of Florida at the time of the *Hoffman* v. *Jones* decision. It is respectfully submitted that there is not another person in all of Florida to whom the Florida Supreme Court opinion in the

instant case would apply. Under such circumstances, the opinion cannot be said to be of such significance as to warrant this Court's time.

IV

Point I of Petitioner

Whether It Is a Violation of Seaboard's Right of Due Process and Equal Protection of the Law As Guaranteed by the Constitution of the United States for the Supreme Court to Reinstate a Judgment That It Had Previously Reversed Because It Was Based on a State Statute That It Had Declared to Be Unconstitutional?

Point II of Petitioner

Whether It Is a Violation of Seaboard's Right to Due Process and Equal Protection of the Law As Guaranteed by the United States Constitution for the Supreme Court of Florida to Give Retrospective Application to a Recent Decision Revitalizing a State Statute Which It Had Previously Held to Be Invalid and Which Was Not in Effect at the Time the Case Was Tried, Appeal Completed and Petition for Certiorari Filed?

combined and restated by the Respondent:

In Holding Hoffman v. Jones to Be Applicable to the Instant Case Did the Florida Supreme Court Violate the Petitioner's Constitutional Rights?

The gist of Petitioner's argument under Points I and II of its Petition is that even though the case might properly be remanded for new trial since Florida has now adopted "comparative negligence", a reinstatement of the original final judgment was improper. At page 12 the Petition asserts:

"The only way that Seaboard can be protected in its constitutional rights is for the case to be re-tried under proper instructions based on the decision of *Hoffman* v. *Jones.*"

At page 11 of the Petition it is argued that the "comparative negligence" doctrine announced in *Hoffman* v. *Jones* sets forth a different procedure of trying cases than the procedure utilized in the original trial under the defunct railroad crossing statute. The Petitioner asserts that *Hoffman* v. *Jones* requires special interrogatories to the jury whereby the jury relates to the Court its findings relative to the percentage of negligence and the total amount of damages. *Hoffman* v. *Jones* requires no such procedure as the Florida Supreme Court undoubtedly realized in ordering the original final judgment reinstated. Indeed, the undersigned counsel has tried several cases under the doctrine announced in *Hoffman* and never have the juries been requested to answer special interrogatories. A jury simply must, in its own mind, apportion the damages in exactly the same manner as the jury did in the original trial. At any rate, the procedure called for in *Hoffman* v. *Jones* is distinctly a matter of state law and the Florida Supreme Court has rendered its decision in that regard.

The argument at pages 10 and 11 of the Petition that *Hoffman* v. *Jones* violated the doctrine of separation of powers is of such a nature it requires little comment. Suffice it to say that neither "contributory negligence" nor "comparative negligence" are matters of statutory law. Rather, they are both judicially created doctrines which, in view of changing circumstances and modern times, may be modified by Court decision.

The Petitioner, at page 10 of the Petition, relies upon *Gibbs* v. *Zimmerman,* 290 U.S. 326 (1933) for the proposition that it somehow had a "vested right" in the doctrine

of "contributory negligence". *Gibbs* hardly stands for such a proposition. Where, as here, the substantive state law has undergone a change as a result of a recent judicial decision while a case is still pending and where at the time of the decision the Court sets forth rationally the class of cases to which the recent decision will apply, a litigant cannot reasonably argue a denial of due process or equal protection because his case falls within the class of cases affected by the change in the law. There is no "vested right" in the continuance of an outmoded and unjust doctrine. Indeed, if it were in fact the law that a recent judicial decision in one case cannot change the "law of the case" in another pending case, did not the respondent have a "vested right" in "comparative negligence" under the *Loftin* v. *Crawley's, Inc.* decision, 8 So.2d 909 (Fla. 1942) which originally had held F.S. Section 768.06, F.S.A. 1959 constitutional?

In *Demorest* v. *City Bank Farmers T. Co.*, 321 U.S. 36, 48, 49 (1944) cited at page 10 of the Petition, this Court was confronted with a legislative enactment which changed the law and affected the litigants. Pointing out that the new statute did not operate retroactively but only affected cases "pending at or instituted after its enactment", this Court found no constitutional infringement by the New York Legislature. The Florida Supreme Court in *Hoffman* v. *Jones* stated that the decision would only apply to cases pending in the Appellate Courts in which the doctrine of "comparative negligence" had been "appropriately and properly raised during some stage of the litigation". (PET-5a) In the instant case, the "comparative negligence" doctrine had been the doctrine under which the original trial had proceeded. The Florida Supreme Court therefore simply reinstated the original jury verdict. This was not, as the Petitioner argues at page 8 of the Petition, because the Florida Supreme Court chose "to revitalize the dead

statute", but because "comparative negligence" is now the law of Florida and the case had already properly been tried under that doctrine.

V

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition does not present any questions warranting review by this Court and should be denied.

Respectfully submitted,

JOS. D. FARISH, JR.
Of Counsel

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been furnished Madison F. Pacetti, Esq., Caldwell, Pacetti, Barrow & Salisbury, 324 Royal Palm Way, Palm Beach, Florida 33480, Attorneys for Petitioner, by mail, this the 29th day of January, 1974.

JOS. D. FARISH, JR.
Attorney

of "contributory negligence". *Gibbs* hardly stands for such a proposition. Where, as here, the substantive state law has undergone a change as a result of a recent judicial decision while a case is still pending and where at the time of the decision the Court sets forth rationally the class of cases to which the recent decision will apply, a litigant cannot reasonably argue a denial of due process or equal protection because his case falls within the class of cases affected by the change in the law. There is no "vested right" in the continuance of an outmoded and unjust doctrine. Indeed, if it were in fact the law that a recent judicial decision in one case cannot change the "law of the case" in another pending case, did not the respondent have a "vested right" in "comparative negligence" under the *Loftin* v. *Crawley's, Inc.* decision, 8 So.2d 909 (Fla. 1942) which originally had held F.S. Section 768.06, F.S.A. 1959 constitutional?

In *Demorest* v. *City Bank Farmers T. Co.*, 321 U.S. 36, 48, 49 (1944) cited at page 10 of the Petition, this Court was confronted with a legislative enactment which changed the law and affected the litigants. Pointing out that the new statute did not operate retroactively but only affected cases "pending at or instituted after its enactment", this Court found no constitutional infringement by the New York Legislature. The Florida Supreme Court in *Hoffman* v. *Jones* stated that the decision would only apply to cases pending in the Appellate Courts in which the doctrine of "comparative negligence" had been "appropriately and properly raised during some stage of the litigation". (PET-5a) In the instant case, the "comparative negligence" doctrine had been the doctrine under which the original trial had proceeded. The Florida Supreme Court therefore simply reinstated the original jury verdict. This was not, as the Petitioner argues at page 8 of the Petition, because the Florida Supreme Court chose "to revitalize the dead

statute", but because "comparative negligence" is now the law of Florida and the case had already properly been tried under that doctrine.

V

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition does not present any questions warranting review by this Court and should be denied.

Respectfully submitted,

Jos. D. Farish, Jr.
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Attorneys for Respondent

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I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been furnished Madison F. Pacetti, Esq., Caldwell, Pacetti, Barrow & Salisbury, 324 Royal Palm Way, Palm Beach, Florida 33480, Attorneys for Petitioner, by mail, this the 29th day of January, 1974.

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Attorney